

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Case No.: 2:16-cr-00268-APG

Plaintiff

ORDER DENYING MOTION TO VACATE

V.

[ECF No. 59]

ROBERT BAUSTAMANTE,

Defendant

8 Defendant Robert Baustamante pleaded guilty to being a felon in possession of a firearm
9 in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He moves under 28 U.S.C. § 2255 to
10 vacate his conviction and sentence. ECF No. 59. He argues that, based on the Supreme Court's
11 holding in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), his indictment is fatally defective
12 because the government failed to allege that he knew he was a felon when he possessed the
13 firearm.

14 I deny Baustamante's motion. The indictment is defective under *Rehaif* because it fails
15 to allege that Baustamante knew he was a felon. That defect did not deprive this court of
16 jurisdiction. And Baustamante cannot show that he is actually prejudiced by that defect.

Background

18 As Baustamante conceded at his sentencing, he has a “long criminal history.” He already
19 had, at that time, seven felony convictions, the first of which he received in 1985.¹ Of particular
20 relevance to the present motion, Baustamante had at least two convictions for which he both was
21 sentenced to and actually served more than one year of incarceration before he committed the
22 instant offense. In 2008, he was convicted of felony DUI, received a sentence of 33 months, and

¹ He also had 14 misdemeanor convictions.

1 served nearly two years in incarceration. In 2013, Baustamante was convicted of felony
2 attempted possession of a stolen vehicle, receiving a sentence of 14 to 35 months. He served 15
3 months of that sentence in prison.

4 The indictment in the present case alleged that in January 2015, Baustamante:

5 having been convicted of crimes punishable by imprisonment for a term exceeding one
6 year . . . did knowingly possess a firearm . . . said possession being in and affecting
7 interstate commerce and said firearm having been shipped and transported in interstate
commerce, all in violation of Title 18, United States Code, Sections 922(g)(1) and
924(a)(2).

8 ECF No. 1. In August 2017, Baustamante pleaded guilty to that charge. ECF Nos. 36, 37. I
9 sentenced him to 57 months of imprisonment, to be followed by three years of supervised
10 release. Baustamante appealed. The Ninth Circuit dismissed that appeal, finding that he waived
11 his right to appeal his conviction and sentence and that the record “disclose[d] no arguable issue
12 as to the validity of the waiver.” In May 2020, Baustamante filed the instant motion seeking to
13 set aside his conviction and sentence based on *Rehaif*.

14 **Analysis**

15 Baustamante was indicted, pleaded guilty, and was sentenced in 2017 for his possession
16 of a firearm as a convicted felon. At that time, under the law of this circuit and every other
17 circuit, the government was neither required to allege in the indictment nor present evidence and
18 prove at trial that the defendant knew of his status as a convicted felon. Two years later, the
19 Supreme Court held “that in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the
20 Government must prove both that the defendant knew he possessed a firearm and that he knew

1 he belonged to the relevant category of persons barred from possessing a firearm.” *Rehaif*, 139 S.
 2 Ct. at 2200.²

3 The indictment against Baustamante did not allege that he knew he had been convicted of
 4 a crime punishable by more than one year of imprisonment. Under *Rehaif*, the indictment is
 5 defective because it lacks an allegation that he knew he had been convicted of a crime punishable
 6 by imprisonment for a term exceeding one year. Baustamante argues he is entitled to relief
 7 because this defect stripped this court of jurisdiction and because the defect violated his rights
 8 under the Fifth and Sixth Amendments. Neither of these theories warrants § 2255 relief.³

9 This court “has jurisdiction of all crimes cognizable under the authority of the United
 10 States . . .” *Lamar v. United States*, 240 U.S. 60, 65 (1916). “The objection that the indictment
 11 does not charge a crime against the United States goes only to the merits of the case” and does
 12 not deprive the court of jurisdiction. *Id.*; *see also United States v. Cotton*, 535 U.S. 625, 630
 13 (2002) (citing *Lamar* for the proposition that “defects in an indictment do not deprive a court of
 14 its power to adjudicate a case.”). The Ninth Circuit has repeatedly cited *Cotton* for this principle.
 15 *See, e.g., U.S. v. Velasco-Medina*, 305 F.3d 839, 845 (9th Cir. 2002) (rejecting the argument that
 16 the indictment’s failure to allege the specific intent required for attempted reentry deprived the
 17 district court of jurisdiction). It applies even when considering appeals based on *Rehaif*. *See*,

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19 ² “It is therefore the defendant’s *status*, and not his conduct alone, that makes the difference.
 20 Without knowledge of that status, the defendant may well lack the intent needed to make his
 21 behavior wrongful.” *Rehaif*, 139 S. Ct. at 2197 (emphasis original). I reject Baustamante’s
 22 argument that, under *Rehaif*, the government must also prove that the defendant knew that he
 23 was barred from possessing a firearm. *See United States v Dillard*, No. 2:09-cr-00057-JAD-
 GWF, 2020 WL 2199614, at *4 (D. Nev. May 6, 2020).

³ Baustamante seeks relief solely because, under *Rehaif*, the indictment is now recognized as
 defective. He does not challenge the sufficiency of the evidence supporting his plea or
 conviction.

1 *e.g., United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020) ("[T]he indictment's
 2 omission of the knowledge of status requirement did not deprive the district court of
 3 jurisdiction."). This court had and has jurisdiction over Baustamante's case.

4 Because this § 2255 proceeding is Baustamante's first challenge to his indictment, he
 5 must show cause and actual prejudice.⁴ "To challenge a conviction in a § 2255 proceeding based
 6 upon a claim of error that could have been raised on direct appeal but was not, a defendant must
 7 demonstrate both cause to excuse the procedural default, as well as actual prejudice resulting
 8 from that error." *United States v. Seng Chen Yong*, 926 F.3d 582, 590 (9th Cir. 2019). "'Cause'
 9 is a legitimate excuse for the default; 'prejudice' is actual harm resulting from the alleged
 10 constitutional violation." *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984).

11 For purposes of this motion only, I will assume Baustamante can show cause to excuse
 12 the default. But Baustamante has not and cannot show he is actually harmed by the defective
 13 indictment.

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16 ⁴ Baustamante is not entitled to automatic dismissal of the defective indictment because he
 17 did not challenge the indictment prior to pleading guilty. "[I]f properly challenged prior to trial,
 18 an indictment's complete failure to recite an essential element of the charged offense is not a
 19 minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of
 20 the indictment." *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999); *see also United*
States v. Qazi, 975 F.3d 989, 992 (9th Cir. 2020) ("If a defendant properly challenges an
 indictment before trial and, on de novo appellate review, we determine the indictment omitted an
 essential element, *Du Bo* requires automatic dismissal regardless of whether the omission
 prejudiced the defendant.").

21 Baustamante is not entitled to a plain error review of his challenge to his indictment
 22 because he did not challenge it on appeal. An untimely challenge to an indictment is reviewed
 23 for plain error if it is raised for the first time on appeal. *See United States v. Velasco-Medina*,
 305 F.3d 839, 846 (9th Cir. 2002) (untimely challenge to an indictment on appeal reviewed for
 plain error); *United States v. Ross*, 206 F.3d 896, 899 (9th Cir. 2000) (same).

1 The government will be able to re-indict Baustamante to allege knowledge-of-status.

2 “[T]he double jeopardy guarantee ‘imposes no limitations whatever upon the power to *retry* a
3 defendant who has succeeded in getting his first conviction set aside’ (emphasis in original).”

4 *United States v. DiFrancesco*, 449 U.S. 117, 131, (1980) quoting *North Carolina v. Pearce*, 395
5 U.S. 711, 720 (1969). The only exception is when a conviction is reversed because of
6 insufficiency of the evidence. Baustamante has not challenged the sufficiency of the facts he
7 admitted in his guilty plea.⁵

8 I can consider the entire record to determine whether Baustamante is being actually
9 harmed by the defective indictment. The Ninth Circuit recently reviewed an appeal of a § 922(g)
10 conviction based on *Rehaif. Johnson*, 979 F.3d 632 (9th Cir. 2020). The defendant was
11 convicted after a bench trial on stipulated facts that did not include his knowledge-of-status. The
12 Ninth Circuit declined to dismiss the case and instead affirmed the conviction. The court
13 determined that Johnson’s appeal was properly understood as asserting a trial error arising from
14 the district court’s omission of “the knowledge-of-status element now required under *Rehaif*.⁶

15 *Id.* at 636. Because Johnson had not timely objected to the district court’s legal error, his claim
16 was subject to plain error review. *Id.* Finally, as the challenge concerned a trial error rather than
17 insufficient evidence, “retrial would be permitted even if he succeeded in establishing plain error

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19 ⁵ Baustamante’s challenge would fail even if he had challenged the sufficiency of his
20 guilty plea. A challenge to the sufficiency of the evidence is “assessed against the elements that
21 the government was required to prove at the time of trial.” *United States v. Johnson*, 979 F.3d
22 632, 636 (9th Cir. 2020). When assessed at the time of his plea, Baustamante admitted sufficient
23 facts to sustain a conviction for being a felon in possession of a firearm.

⁶ While Johnson framed his claim as challenging the sufficiency of the evidence, the Ninth
Circuit re-framed his claim as he had not contested whether “the government introduced
evidence sufficient to satisfy each of the elements required for conviction at the time of his trial.”
Id. at 636.

1 on appeal.” *Id.* at 637. As retrial was available, the court was authorized to review the entire
 2 record on appeal, not just the record adduced at trial. *Id.* Reviewing for plain error, the court
 3 held that a retrial would result in the same conviction because the defendant could not offer a
 4 plausible basis for a different outcome. *Id.* at 639.

5 [I]f the hypothetical retrial is certain to end in the same way as the first one, then
 6 refusing to correct an unpreserved error will, by definition, not result in a
 7 miscarriage of justice. Indeed, choosing to correct the error in those
 8 circumstances would produce the very sort of wasteful reversals that [Federal
 9 Rule of Criminal Procedure] 52(b) aims to avoid.

10 *Id.* at 637 (internal quotation and citation omitted).⁷ The record on appeal (including the
 11 Presentence Report) showed that Johnson had several prior felony convictions and had already
 12 served three prison sentences of over one year. “In light of the sentences imposed in his earlier
 13 cases, Johnson cannot plausibly argue that a jury . . . would find that he was unaware of his
 14 status as someone previously convicted of an offense punishable by more than a year in prison.”
Id. at 639. That evidence justified affirming the conviction even though the stipulated facts in
 the bench trial did not establish Johnson’s knowledge-of-status.

15 The *Johnson* court employed the plain error standard because the case arose on direct
 16 appeal and the defendant failed to object at trial. *Id.* at 636. Here, however, Baustamante raises
 17 this issue in a § 2255 motion. The “cause and actual prejudice” standard for review of a § 2255
 18 motion is a significantly higher burden than the plain error standard on a direct appeal. *United*
19 States v. Frady, 456 U.S. 152, 166-67 (1982) (“We reaffirm the well-settled principle that to
 20 obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on

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 22 ⁷ “As the Supreme Court has stated, Rule 52(b) authorizes courts to correct unpreserved errors,
 23 but that power is to be used sparingly, solely in those circumstances in which a miscarriage of
 justice would otherwise result.” *Johnson*, 963 F.3d at 852.

1 direct appeal.”).⁸ *Johnson* would require me to deny Baustamante’s motion under a plain error
 2 review, so I likewise must deny the motion under the higher hurdle of the cause and prejudice
 3 standard.

4 As in *Johnson*, I can look to the entire record, including the Presentence Report, to
 5 determine whether Baustamante can show actual prejudice from the defective indictment.
 6 *Johnson*, 979 F.3d at 637. According to the Presentence Report, Baustamante has been
 7 convicted on seven different occasions of offenses for which he could have been imprisoned for
 8 more than one year. For at least two of those occasions, he was actually sentenced to a term of
 9 imprisonment exceeding one year: in 2008, to a term of 33 months, and in 2013 to a term of 14-
 10 35 months. For each of these sentences, Baustamante actually served more than one year.
 11 Baustamante offers no evidence or argument disputing this criminal history. He does not claim
 12 he was unaware that he had been convicted of a felony or that he actually served at least two
 13 different sentences that each exceeded one year of imprisonment. To the contrary, he admits that
 14 “[a]t the time [he] was in possession of the firearm, he had been previously convicted of a crime
 15 punishable by a term of imprisonment exceeding one year.” ECF No. 37 at 4. No plausible
 16 argument exists that a grand jury would find that he was unaware of his status as a convicted
 17 felon. If I dismiss the indictment, he could be reindicted and retried, and the result would be the
 18 same.

19 Again, I assume Baustamante can show cause for failing to challenge his indictment in
 20 his appeal. And under *Rehaif*, the indictment is defective because it lacks an allegation that
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22 ⁸ *Cf. United States v. Timmreck*, 441 U.S. 780, 784 (1979) (“[T]he concern with finality served
 23 by the limitation on collateral attack has special force with respect to convictions based on guilty
 pleas.”).

1 Baustamante knew he had been convicted of a crime punishable by imprisonment for a term
2 exceeding one year. But the overwhelming and uncontroverted evidence establishes that
3 Baustamante is not suffering actual prejudice because of that defect under any of his theories. I
4 therefore deny his § 2255 motion.

5 **Certificate of Appealability**

6 To appeal this order, Baustamante must receive a certificate of appealability. 28 U.S.C.
7 § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22-1(a). To obtain that certificate, he
8 “must make a substantial showing of the denial of a constitutional right, a demonstration that . . .
9 includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the
10 petition should have been resolved in a different manner or that the issues presented were
11 adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483–
12 84 (2000) (quotation omitted). This standard is “lenient.” *Hayward v. Marshall*, 603 F.3d 546,
13 553 (9th Cir. 2010) (en banc).

14 I have denied Baustamante’s motion based on the Ninth Circuit’s decision in *Johnson*.
15 While *Johnson* employed the plain error standard of review, Baustamante faces a “significantly
16 higher hurdle” for his § 2255 motion. *Frady*, 456 U.S. at 166. The undisputed facts establish that
17 Baustamante is not prejudiced by the defective indictment because he could be reindicted and
18 retried and the outcome would be the same. Reasonable jurists cannot debate that conclusion. I
19 will thus deny Baustamante’s request for a certificate of appealability.

20 I THEREFORE ORDER that defendant Robert Baustamante’s motion under 28 U.S.C.
21 § 2255 (**ECF No. 59**) is **DENIED**.

22 I FURTHER ORDER that Baustamante is denied a certificate of appealability.
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I FURTHER ORDER the Clerk of Court to enter a separate civil judgment denying Baustamante's § 2255 motion. The Clerk also shall file this order and the civil judgment in this case and in the related civil case number 2:20-cv-0841-APG.

DATED this 7th day of December, 2020.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE